UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:	)	
	)	
THOMAS JOSEPH CAHILLANE,	)	CASE NO. 04-65210 JPK
	)	Chapter 7
Debtor.	)	
**********		
GORDON E. GOUVEIA, TRUSTEE,	)	
Plaintiff,	)	
v.	)	ADVERSARY NO. 05-6144
TC INVESTMENTS, LLC, CHARLES R. SPARKS, and RONALD K NABHAN,	)	
Defendants.	)	

ORDER CONCERNING MOTION FOR APPROVAL OF PLAINTIFF'S DISPUTED CONTENTIONS OF PRE-TRIAL ORDER AND FOR LEAVE TO AMEND COMPLAINT TO CONFORM TO THE PROOF ("PLAINTIFF'S MOTION TO AMEND")

This matter is before the court on the Motion for Approval of Plaintiff's Disputed Contentions of Pre-Trial Order and for Leave to Amend Complaint to Conform to the Proof (record entry #136), and the Defendants' Response to Plaintiff's Motion for Approval of Plaintiff's Disputed Contentions (record entry #158).

The parties' dispute is whether the "Plaintiff's Contentions" stated in Section D, #11 and #22, of the Pre-Trial Order filed by the parties should be included as issues before the court in this case. Those provisions of the plaintiff's proposed issues to be presented to the court are the following:

> 11. Plaintiff further contends that any claims that Sparks and Nabhan may have otherwise had were inferior to the rights and status of Plaintiff as a hypothetical lien creditor and bone fide purchaser pursuant to 11 U.S.C. § 544(a)(1) through (3), and a party with the rights of actual creditors under Indiana Law pursuant to 11 U.S.C. § 544(b), warranting the inclusion of the Cahillane Articles, all membership interests in T.C. Investments, "LLC" and the Mariposa Property as part of the Cahillane Bankruptcy Estate . . .
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> . . .
>
> 22. Plaintiff further contends that Cahillane's concealment and transfers of property, if any, constitute transfers and the

> incurrence of obligations in favor of Sparks and Nabhan with the actual intent to hinder, delay or defraud Cahillane's creditors pursuant to 11 U.S.C. § 548A)(1)(A).

The defendants have objected to the plaintiff's inclusion of the issues stated in paragraphs 11 and 22. The parties have advanced the contentions stated in paragraph 11 as a Contested Issue of Law in Section H, paragraph 6 of the pre-trial order, as follows:

> (6) Whether any rights to seek a constructive trust, reformation or other rights and remedies of Sparks and Nabhan with respect to T.C. Investments, "LLC," to the extent that it exists, TC Investments, LLC, to the extent that it exists, and the Mariposa Property, if any, may be avoided by Plaintiff pursuant to 11 U.S.C. § 544(a) such that T.C. Investments, "LLC," and TC Investments, LLC, to the extent that they exist, and any membership interests therein and the Mariposa Property can be brought into the Cahillane Bankruptcy Estate in the Bankruptcy Case;

The parties have advanced the contentions stated in paragraph 22 as a Contested Issue of Law in Section H, paragraph 16 of the pre-trial order, as follows:

> (16) Whether Cahillane transferred any interests to Sparks or Nabhan with actual intent to hinder, delay or defraud creditors pursuant to 11 U.S.C, § 548(a)(1)(A), which issue is objected to by the Defendants as untimely.

The gist of the Plaintiff's Motion to Amend is that the plaintiff seeks to add claims under 11 U.S.C. § 548(a)(1)(A) and 11 U.S.C. § 544(a)(1)–(3) to the contentions advanced by the plaintiff in his amended complaint. Theories of recovery under 11 U.S.C. § 548(a)(1)(A) and under 11 U.S.C. § 544 were not in any manner designated as theories of recovery in the amended complaint. The defendants oppose the proposed amendments.

The court deems the amendment proposed with respect to § 544 to be easily resolved. The amendment proposed with respect to § 548(a)(1)(A) is more involved.

Amendments to pleadings before trial, in the context of this motion, are governed by Fed.R.Bankr.P. 7015/Fed.R.Civ.P. 15(a)(2), the latter of which states:

> (2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so

requires.

The United States Court of Appeals for the Seventh Circuit has well-defined standards for the application of the foregoing Rule. In *Soltys v. Costello*, 520 F.3d 737, 743 (7th Cir. 2008), the following was stated:

> Federal Rule of Civil Procedure 15(a) provides that if a party is not entitled to amend a pleading as a matter of course, it may amend "with the opposing party's written consent or the court's leave." The court "should freely give leave when justice so requires." Fed.R.Civ.P. 15(a)(2). "Although the rule reflects a liberal attitude towards the amendment of pleadings, courts in their sound discretion may deny a proposed amendment if the moving party has unduly delayed in filing the motion, if the opposing party would suffer undue prejudice, or if the pleading is futile." *Campania Mgmt. Co. v. Rooks, Pitts & Poust,* 290 F.3d 843, 848-49 (7th Cir.2002). Delay on its own is usually not reason enough for a court to deny a motion to amend. *Dubicz v. Commonwealth Edison Co.,* 377 F.3d 787, 792-93 (7th Cir.2004); *Perrian v. O'Grady,* 958 F.2d 192, 194 (7th Cir.1992). But " 'the longer the delay, the greater the presumption against granting leave to amend.' " *King v. Cooke,* 26 F.3d 720, 723 (7th Cir.1994) (quoting *Tamari v. Bache & Co.,* 838 F.2d 904, 908 (7th Cir.1988)).

In the earlier case of *Perrian v. O'Grady*, 958 F.2d 192, 193 (7th Cir. 1992), a slightly more expanded list of factors to be considered with respect to the negative impact of an amendment was stated:

> Any time after a responsive pleading has been served, a party must seek leave from the court or written consent of the adverse party to amend a pleading. *Amendola v. Bayer,* 907 F.2d 760, 764 (7th Cir.1990) (citing Fed.R.Civ.P. 15(a)). While leave to amend is to be freely given when justice so requires, Fed.R.Civ.P. 15(a), it is "inappropriate where there is undue delay, bad faith, dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of the amendment." *Villa v. City of Chicago,* 924 F.2d 629, 632 (7th Cir.1991) (citing *Foman v. Davis,* 371 U.S. 178, 183, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962)). It is within the sound discretion of the district court whether to grant or deny a motion to amend. *Campbell v. Ingersoll Milling Mach. Co.,* 893 F.2d 925, 927 (7th Cir.1990). A court of appeals will overturn a district court's denial of a motion to amend only if the district court has abused that discretion by not providing a justifying reason for its

> decision. *J.D. Marshall Int'l, Inc. v. Redstart, Inc.,* 935 F.2d 815, 819 (7th Cir.1991).

Finally, in the earlier case of *Fort Howard Paper Company v. Standard Havens, Inc.*, 901 F.2d 1373, 1379-1380 (7th Cir. 1990); *rehearing & rehearing en banc denied*, May 24, 1990, the following was stated:

> Courts have consistently held that leave to amend should be "given when justice so requires[,]" *Bohen v. City of East Chicago, Ind.,* 799 F.2d 1180, 1184 (7th Cir.1986); *City of Columbia v. Paul N. Howard Co.,* 707 F.2d 338 (8th Cir.1983); *Joseph v. United States Civil Service Commission,* 554 F.2d 1140, 1147 (D.C.Cir.1977); *Hilgeman v. National Ins. Co. of America,* 547 F.2d 298, 303 (5th Cir.1977), and that the leave sought should be freely given. *Knapp v. Whitaker,* 757 F.2d 827, 849 (7th Cir.1985). Nevertheless, as we stated in *Feldman v. Allegheny Intern, Inc.,* 850 F.2d 1217, 1225 (7th Cir.1988), FRCP 15(a) "is not a license for carelessness or gamesmanship. Parties to litigation have an interest in speedy resolution of their disputes without undue expense. Substantive amendments to the [Answer] just before trial are not to be countenanced and only serve to defeat these interests. The district court must consider the harm when deciding whether to grant leave." The judicial system cannot allow parties to freely void orders by their agreement.
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> It is wholly within a district court's discretion to deny an amendment to the pleadings for delay and prejudice to the opposing party. *Bohen,* 799 F.2d at 1185; *Knapp,* 757 F.2d at 849. In the parties conditional stipulation they agreed to allow the amendment only if Fort Howard was permitted new discovery on the defenses. Apparently, the district court was concerned that if it had allowed the addition of the new defenses of misuse and hindrance the parties would be forced to reopen discovery, including the gathering of new evidence, and the identification of appropriate legal arguments. All this would have taken time if the parties were to have an opportunity for meaningful trial preparation, which would result in additional expenditures by the parties. *See Feldman,* 850 F.2d at 1225.
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> Beyond prejudice to the parties, a trial court can deny amendment when concerned with the costs that protracted litigation places on the courts. Delay impairs the "public interest in the prompt resolution of legal disputes. The interests of justice go beyond the interests of the parties to the particular suit; ... delay in resolving a suit may harm other litigants by making them wait longer in the court queue. Hence, when extreme, 'delay itself may be considered prejudicial'." *Tamari v. Bache & Co. (Lebanon)*

> *S.A.L.,* 838 F.2d 904, 909 (7th Cir.1988) (quoting *Andrews v. Bechtel Power Corp.,* 780 F.2d 124, 139 (1st Cir.1985)).

Amalgam of the foregoing standards results in a clear favoring of allowance of amendments in order to present all matters involved in the case to the court at trial, so that "justice" can be done based upon all circumstances and legal theories which can properly be advanced before the court. This overriding policy is tempered by considerations of improper motives on the part of the party proposing the amendment; futility of the amendment; or undue prejudice to the opposing party by virtue of allowance of the amendment. A fourth factor, less pertinent than the previously designated three factors, is delay in seeking the amendment; however, delay is not in and of itself a reason for denying a Rule 15(a)(2) motion.

The element of prejudice can be alleviated by continuance of the trial to allow the party opposing the amendment the opportunity to conduct discovery regarding the issues raised by the amendment and to prepare a case in response to the amendment.

The plaintiff's motion is somewhat confusing in its invocation of Rule 15(a)(2) in conjunction with its request to amend the complaint "to conform to the proof". This latter request is more in the nature of the result which would be arrived at under Fed.R.Bankr.P. 7054(a)/Fed.R.Civ.P. 54(c), the latter of which provides:

> Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

This provision is applicable after a case has been tried, and at this juncture in this adversary proceeding there has been no trial and thus no proof submitted. In this context, the plaintiff's motion somewhat mixes apples and oranges, or more *apropos*, preparation of a pie to be placed in the oven and the tasting of the results of the recipe after the pie has been baked. The court will review the plaintiff's motion solely under the provisions of Rule 15(a)(2).

The defendants' response is somewhat equally inapposite. In paragraphs 4 and 5 of

their response, the defendants argue that the plaintiff is seeking to assert an action under 11 U.S.C. § 541(a)(3) at this juncture, when the original complaint asserted only an action under 11 U.S.C. § 541(a)(1). 11 U.S.C. § 541 is not an avoidance provision: it is simply a section which states the results of inclusion of property in the estate under certain circumstances. For example, if the plaintiff were to succeed on Counts V and/or VI in the amended complaint, 11 U.S.C. § 541(a)(3) merely directs the result of that success in terms of the property recovered as being property of the estate. Thus, any assertions that the plaintiff's motion involves something under 11 U.S.C. § 541 are misplaced.

Let's turn first to assertions with respect to 11 U.S.C. § 544(a), as those are stated in paragraph D.11 and H.6 of the pre-trial order. The court derives from reading these two paragraphs together that paragraph H.6 is intended to reflect the assertions in paragraph D.11. This latter assertion relates to a motion for relief from the stay filed by the defendants previously in this case, which the court consolidated into its determination of the defendants' motion for summary judgment. In that motion, the defendants sought relief from the automatic stay to in part amend certain documents which are at issue in this case in relation to the interests of the various parties with respect to a parcel of real estate. In record entry #112 – the court's memorandum of decision with respect to the consolidated motion for summary judgment/motion for relief from stay – the court specifically denied the defendants' request for relief from the automatic stay under 11 U.S.C. § 362(a) with respect to reformation of documents. Thus, at this juncture, these issues are no longer before the court. Based upon paragraph D.11, the focus of the plaintiff's requested assertion under paragraph H.6 is an issue that is no longer before the court. As a result, the plaintiff's motion with respect to paragraphs D.11 and H.6 is denied.[1]

[1] The Trustee's status under 11 U.S.C. § 544(a) is not in any manner dependent upon any evidentiary proof: it is simply a legal status imparted to the Trustee as a matter of law. If

We now turn to the provisions of paragraphs D.22 and H.16. The gist of the Trustee's requested amendment is to add a claim under 11 U.S.C. § 548(a)(1)(A), a contention which is entirely missing from the Trustee's amended complaint, which proceeded only under 11 U.S.C. § 548(a)(1)(B).

The standards for review of the Trustee's proposed amendment are set out above. The standard is a liberal one, and is designed to place all pertinent issues before the court, so long as certain factors are not implicated in the request for amendment. Under those standards, the court does not deem the plaintiff's request for amendment to be motivated by bad faith, dilatory motive, and obviously not by any failure to cure averments of the amended complaint by the court's prior allowance of an opportunity to do so. Based upon the entire record in this case before the court, the proposed amendment may not be futile, depending upon the proof which the plaintiff can summon for its support. There has obviously been delay in the attempt to amend the amended complaint, but this delay in and of itself does not give rise to grounds for denying the requested amendment. The critical issue is the prejudice to the defendants which will arise if the amendment is allowed.

The defendants respond to the plaintiff's motion is part by arguing that they have had no notice of a potential claim under § 548(a)(1)(A). In paragraph 13 of his response, the plaintiff outlines the provisions of the amended complaint which he alleges placed the defendants on notice of this potential claim. In paragraph 7 of their response, the defendants have responded to this argument advanced by the plaintiff. The principal assertion in the amended complaint upon which the plaintiff rests his case as to providing notice to the defendants of its assertion is paragraph 30 of the amended complaint, which states:

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the anticipated convoluted trial record in this case results somehow in a circumstance in which the Trustee's avoidance powers under 11 U.S.C. § 544(a)(3) are implicated, the appropriate point for consideration of the Trustee's proposed amendments is under Fed.R.Bankr.P. 7054/Fed.R.Civ.P. 54(c).

> 30. Just prior to the closing, and during the pendency of the litigation by the Bank on the Bank Indebtedness and the Divorce Litigation, Cahillane, Nabhan and Sparks acted to thwart and harm the rights of Cahillane's creditors by attempting to convey portions of Cahillane's membership interests in TCL to Nabhan and Sparks.

In arguments which truly involve the dicing of apples into very thin slices (i.e., the splitting of hairs), the plaintiff asserts that this paragraph put the defendants on notice of a potential assertion under 11 U.S.C. § 548(a)(1)(A), while the defendants contend that the phrase "acted to thwart and harm the rights of Cahillane's creditors" provided no notice whatsoever of an assertion that Cahillane acted "with actual intent to hinder, delay or defraud" his creditors. The court determines that paragraph 30 provides some notice of the plaintiff's § 548(a)(1)(A) contention. The court is also aware of the extensive record before the court with respect to the defendants' motion for summary judgment, the incredible amount of documentary material presented to the court with respect to that matter, and the contentions advanced by the parties in their respective memoranda in that matter. It is a little bit beyond the court to believe that the defendants – after all of the proceedings in this case – did not have a pretty solid indication that the plaintiff was asserting that the transactions at issue under the amended complaint implicated 11 U.S.C. § 548(a)(1)(A). Moreover, as the plaintiff points out, Count III of the amended complaint has survived for trial, and the evidence regarding piercing of the corporate veil of "TC Investments, LLC" is in not insignificant part that which would be anticipated to be presented by the plaintiff in support of a § 548(a)(1)(A) claim.

The critical issue is prejudice which may be suffered by the defendants at this point in the proceeding if the plaintiff is allowed to proceed with a claim under 11 U.S.C. § 548(a)(1)(A). The defendants' response is essentially devoid of any substantive detailed assertions of

prejudice.[2]

Based upon the entire record before it, the court finds that the plaintiff's assertion of a claim under 11 U.S.C. § 548(a)(1)(A) is not a "surprise" to the defendants. The court further finds that the standards for amendment to the pleadings under Rule 15(a)(2) have been satisfied by the plaintiff with respect to his assertion of a claim under 11 U.S.C. § 548(a)(1)(A). However, the court also deems it appropriate to allow the defendants to file a motion for continuance of the trial scheduled to commence on January 18, 2011 to conduct discovery which they deem necessary to meet the plaintiff's contentions under 11 U.S.C. § 548(a)(1)(A).

The court determines as follows:

A. The plaintiff's request to add issue as designated in Sections D.11 and H.6 of the pre-trial order should be denied, in that the issues sought to be added are not before the court in the context in which the plaintiff seeks to assert those claims.

B. The assertions sought to be advanced by the plaintiff in paragraphs D.22 and H.16 of the pre-trial order should be allowed to be advanced by the plaintiff in this case, and the plaintiff should be allowed to file an amended complaint asserting an action under 11 U.S.C. § 548(a)(1)(A).

IT IS ORDERED as follows:

I. The Plaintiff's Motion to Amend is denied as to matters addressed by Sections D.11 and H.6 of the pre-trial order.

II. The Plaintiff's Motion to Amend is granted as to the assertions advanced in Sections D.22 and H.16 in the pre-trial order, and the plaintiff is granted leave to in essence

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[2] Interestingly, both parties have filed motions to amend their pleadings under Rule 15(a)(2) – the plaintiff to add claims under the amended complaint, and the defendants to add asserted defenses to the plaintiff's action. As the court would expect of litigators, the plaintiff has opposed the defendants' motion to amend, and the defendants have opposed the plaintiff's motion to amend. Missing in both of the oppositions is any concrete detailed assertion of the prejudice which will be suffered by allowing the requested amendments.

amend his amended complaint by including Sections D.22 and H.16 in the final pre-trial order.

III. If the defendants deem themselves prejudiced by the allowed amendment of the pleadings, the court will entertain a motion to continue the trial scheduled for January 18, 2011 in order to allow the defendants to pursue discovery; any such motion must be filed by December 23, 2010.

Dated at Hammond, Indiana on December 6, 2010.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

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